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No. 747

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED AIRCRAFT CORPORATION (HAMILTON STANDARD DIVISION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) is reported at 333 F. 2d 819. The Board's decision and order (J.A. 2–25)[1] are reported at 144 NLRB 492.

JURISDICTION

The judgment of the court of appeals (Pet. 5a–6a) was entered on July 27, 1964, and a petition for rehearing was denied on September 21, 1964 (Pet. 6a).

[1] "J.A." references are to the portions of the record printed for the use of the court below and filed with the petition.

759-817—65

The petition for a writ of certiorari was filed on December 9, 1964. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may determine the scope of a previously established bargaining unit, which the employer has questioned in good faith, in a proceeding to determine whether the employer has committed an unfair labor practice under Section 8(a)(5) of the National Labor Relations Act.

2. Whether the Board's conclusion that a group of trainees are included in the bargaining unit of production and maintenance employees represented by the Union is reasonable.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 7a–14a of the petition.

STATEMENT

In 1941, the Union[2] was certified by the Board as the bargaining representative of the production and maintenance employees at the Company's Hamilton Standard Division, which consists of the "Windsor Locks plant" and the "Broad Brook plant" (J.A. 9–10; 33 NLRB 134, 135). Following the certification, the Union and the Company concluded a collective bargaining agreement, which described the bargaining unit of production and maintenance workers

[2] Lodge No. 743, International Association of Machinists.

as excluding, among others, "apprentices, trainees [and] students * * *" (J.A. 10; 171.). Since this 1941 agreement, the Union and the Company have negotiated ten other collective bargaining agreements, none of which has contained a similar exclusion (J.A. 11; 172–187). The current agreement, concluded in April 1962, describes the bargaining unit as comprised of "all production and maintenance employees, including working leaders and all hourly rated technicians in the chemical, rubber, metallurgical, vibration and electronics laboratories * * *, but shall exclude executives, professional employees, salaried technicians in the Engineering Department, foremen's clerks who have access to confidential information, draftsmen, Plant Production employees, Medical Department employees, salaried office and salaried clerical employees, outside service men, truck drivers, watch engineers, group supervisors and all other supervisors as defined in the National Labor Relations Act, as amended" (J.A. 10–11; 186–187).

Until 1952, Hamilton Standard was situated at East Hartford, Connecticut, adjacent to the premises of Pratt and Whitney, another division of the Company (J.A. 132–133, 135). Off and on since 1941, the Company has operated a training school at some distance from these plants, in Hartford, Connecticut, to which employees of both divisions were sent (J.A. 10; 132, 133–135, 124 NLRB 392). Since the end of World War II, however, no Hamilton Standard employee has been sent to the school (J.A. 10; 136).

In October 1962, the Company posted a notice that it was instituting a "Limited Production Machinist

Program" to provide itself with a pool of trained machinists. The program was to consist of a 22-week training period (J.A. 11; 157–158). During the first 15 weeks there was to be a combination of classroom and machine operations in the Machine School Training Area, which is set apart from the regular operational areas of the factory. On-the-job training in the Limited Production Department was contemplated for the final 7 weeks, during which time the trainees were to be subject to the supervision of an instructor from the training school (J.A. 11; 115). Trainees who successfully completed the program were to be employed permanently in the Limited Production Department, and those who failed to show sufficient progress were to return to their former jobs in other departments, if available (J.A. 11–12; 69–70, 123–124, 125, 138). The Company's regular employees were accorded preferential status as applicants for the training program, but applications from qualified persons who were not employees were considered as well (J.A. 123, 124). The regular employees in the Limited Production Department are members of the bargaining unit represented by the Union (J.A. 72, 73–75, 159–161), as are other production employees to which the Company gives on-the-job training (J.A. 12; 72, 118, 122–123).

Shortly after posting this notice, Union President Butler Seedman conferred with the Company's personnel manager, who informed him that management would not consider trainees in the new program as part of the bargaining unit, and that they would

consequently not be entitled to the benefits of the collective bargaining contract (J.A. 12–13; 71–73, 117–118). Seedman insisted that the mere transfer of an employee to the training school for a temporary training period should not effect his removal from the bargaining unit (J.A. 12; 71–72). During a subsequent conversation between the two men no agreement was reached. In November, Seedman wrote a letter to the personnel manager in which he asked whether the Company had changed its mind on the matter, but received no reply (J.A. 13; 76–77, 164–165). On November 29, the Union filed charges with the Board alleging an unlawful refusal to bargain (J.A. 13).

The Board found that the new trainees were members of the bargaining unit covered by the Union's certification, and that the Company's refusal to bargain with respect to their working conditions violated Sections 8(a) (5) and (1) of the National Labor Relations Act (J.A. 5-6). The Board ordered the Company to cease and desist from refusing to bargain collectively with respect to the working conditions of these trainees, and from interfering with, restraining or coercing employees in the exercise of their organizational rights in any like or related manner (J.A. 8). The Board ordered the Company further to bargain collectively upon request concerning the working conditions of the trainees, and to post an appropriate notice at both Hamilton Standard plants (J.A. 8).

The court of appeals enforced the Board's order in full (Pet. 1a–5a).

ARGUMENT

1. Petitioner's contention that in an unfair labor practice proceeding the Board was not empowered to resolve the question whether the machinist trainees were included in the bargaining unit is insubstantial and does not warrant review by this Court.

Section 9(a) of the Act provides that representatives selected for the purposes of collective bargaining "by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit * * *." There are two methods under the Act by which the appropriate unit and the majority status of a bargaining representative may be determined. Section 9(c)(1) provides for the filing of a representation petition with the Board, pursuant to which the Board may direct an election in such unit as it finds appropriate and certify the results of that election. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Accordingly, if an employer doubts whether the employees whom the union seeks to represent constitute an appropriate unit or belong in a unit represented by the union, he may, pursuant to Section 9(c)(1), petition the Board for a determination of the appropriate unit and the direction of an election therein, or, if the unit claimed by the union is already covered by an outstanding certification, petition the Board to clarify whether the unit includes the employees in question. Alternatively, the employer can simply refuse to bargain with the

union; if a charge of an unfair labor practice is then filed, the Board is required by the provisions of Section 8(a)(5) to determine whether the union was seeking to represent an appropriate bargaining unit. It is well established that representation questions may be determined by either of these routes. See, *e.g.*, *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 266–267; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71–75.[3]

There is no basis in the language or history of the Act, or in reason, for petitioner's suggestion that the kind of issue involved in this case may be determined in a Section 8(a)(5) proceeding, if at all, only when the employer does not question the appropriateness of the bargaining unit in good faith.[4] The employer's

[3] Petitioner's assertion that the Board is unable to determine representation questions as freely or impartially in proceedings pursuant to Section 8(a)(5) as under Section 9(c)(1) of the Act (Pet. 15), is without foundation. There is no basis for the assumption that the "partisan" nature of the former proceedings prevents the Board from exercising independent judgment. Had the Company been concerned to have the dispute between it and the Union resolved by a proceeding under Section 9(c)(1), it could have accomplished this simply by promptly filing with the Board a motion to clarify the outstanding certification. *Cf. United Aircraft Corp., Pratt & Whitney Aircraft Division*, 124 NLRB 392.

[4] To the extent that anything in *Chalet, Inc.*, 107 NLRB 109 (Pet. 17), may suggest such a distinction, that case was explicitly overruled in *Tom Thumb Stores*, 123 NLRB 833, 834–835, and n. 5. See also *United Butchers Abattoir, Inc.*, 123 NLRB 946, 957. The other cases on which petitioner relies (Pet. 17) are inapposite. For example, in *Orkin Exterminating Co.*, 136 NLRB 630, 641–646, the Board dismissed the refusal to bargain charge primarily because the union had not clearly specified the unit in which it sought recognition; and in *Charles F. Reichert*, 124 NLRB 28, the General Counsel failed to sustain

good or bad faith has no bearing on the question whether the unit is in fact appropriate, nor does it affect the efficacy of a Section 8(a)(5) proceeding to determine that question.

2. The Board's conclusion that the machinist trainees were included in the production and maintenance unit covered by its prior certification is reasonable. As the court below pointed out (Pet. 5a):

> The trainees for the most part come from and will return to production departments. They have a vital interest in the wages, hours and working conditions of the production workers. Moreover, the entire bargaining unit has a strong interest in the training program, for example, to see that wages are not undercut by those trainees who perform normal production work.

The exclusion of trainees from the 1941 collective bargaining agreement is not to the contrary. As the court of appeals noted, "in negotiating the 1941 agreement the parties were dealing with a significantly different training program" (Pet. 4a). Similarly, the failure of subsequent collective bargaining agreements to mention trainees "is explained by the fact that after 1941 no members of the bargaining unit attended the East Hartford training school and accordingly

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his burden of showing that the unit asserted by the union was appropriate.

The employer's good faith is relevant where the problem concerns the union's majority status, because that issue may be determined more reliably by the election procedures of Section 9(c)(1) than by the informal methods utilized under Section 8(a)(5). See *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741–742 (C.A.D.C.), certiorari denied, 341 U.S. 914.

there was no occasion further to consider the problem" (*ibid.*).[5]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] There is no substance to petitioner's contention (Pet. 8–13, 16–17, 18–19) that the court of appeals affirmed the Board's order on grounds different from those on which the Board relied. The Trial Examiner, whose report the Board adopted, noted the nature of the Company's training program (J.A. 11–12) and held, in effect, that under the applicable Board precedents, the participants in such a program had a sufficient community of interest with the employees in the bargaining unit represented by the Union to be included in that unit. The cases cited by petitioner (Pet. 16–17) are distinguishable; in none of them did the trainees, as here, both come from the regular work force and perform regular work of employees in the unit while still in the training program. Indeed, in one of the cases cited by petitioner, the Board included in the bargaining unit a group of "apprentices" who did regular work while in training but excluded a group of trainees who were not allowed to do such work. *Newport News Shipbuilding and Dry Dock Co.*, 57 NLRB 1053, 1058–1059.

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